CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1024

CHARLES T. RULE,

Petitioner,

vs.

HATTIE SEARS, EDWIN E. WEBER, MINNIE LOUISE MATTOCKS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

KENNETH E. GRANT,
Counsel for Petitioner.

FRED N. ARNOLDY,
GEORGE T. WARREN,
HENRY H. DRAEGER,
Of Counsel.

INDEX

Subject Index.

	Page
Petition for a writ of certiorari	1
Summary statement of the matter involved	2
Statement disclosing basis of jurisdiction	7
The questions presented	8
The reasons relied on for allowance of the writ	9
Brief in support of petition	13
Opinions below	13
Jurisdiction	14
Statement of the case	14
Specification of errors	14
Summary of the argument	15
Argument	16

Table of Cases Cited.

American Ry. Exp. Co. v. *Kentucky*, 273 U. S. 269	10, 30
Atlantic Brewing Co. v. *Grocery Co.*, 79 F. (2d) 45	24
Barbier v. *Connolly*, 113 U. S. 28	28
Brinkerhoff-Faris Trust & Savings Co. v. *Hill*, 281 U. S. 673	8, 9, 22
Case v. *Los Angeles Lumber Products Co.*, 308 U. S. 106	12
Consolidated Rock Products Co. v. *du Bois*, 312 U. S. 510	27
Cook v. *Cook*, 17 Cal. (2d) 639	16
Duffley v. *McCaskey*, 345 Mo. 550	18
Ernst v. *Searle*, 218 Cal. 233	10, 17, 18
Flammer v. *Morelli*, 100 N. J. Law Rep. 314	19
Gibson Properties Co. v. *City of Oakland*, 12 Cal. (2d) 291	10, 18
Great Northern Ry. Co. v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358	7, 8
Hurtado v. *California*, 110 U. S. 516	11, 28
Lambersen v. *Bashore*, 178 Cal. 321	18
Louisville Joint Stock Bank v. *Radford*, 174 U. S. 674	27

Page

Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S. 257 ..... 9, 17, 20
Missouri, ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313 8
National Surety Co. v. *Coriell*, 289 U. S. 426 27
Northern Pacific Ry. Co. v. *Boyd*, 228 U. S. 482 12
Ochoa v. *Hernandez y Morales*, 230 U. S. 139 ..... 12, 28
Osgoody v. *Talmadge*, 45 F. (2d) 696 19
Papinau v. *Security-First National Bank*, 6 Cal. (2d) 668 18
Powell v. *Alabama*, 287 U. S. 45 31
Railroad Retirement Board v. *Alton Railroad Co.*, 295 U. S. 330 ..... 12, 27
Root v. *Rule*, 348 Ill. 370 19
Rule v. *Sears*, 45 Cal. App. (2d) 374, 114 Pac. (2d) 57, 65 A. C. A. 821, 151 Pac. (2d) 293, 27 A. C. 131, 163 Pac. (2d) 443 1
Swallo v. *Tungsten Products Co.*, 205 Cal. 207 28
620 Church St. Bldg. Corp., In re, 299 U. S. 24 12
Truax v. *Corrigan*, 257 U. S. 312 ..... 10, 22, 30
United States Fidelity & Guaranty Co. v. *State*, 169 Okla 59 18
Virginia v. *Mullens*, 271 U. S. 220 ..... 10, 17, 20

STATUTES CITED

American Jurisprudence, Volume 3, pp. 35 et seq. ... 10, 18
California Jurisprudence, Ten Year Supp., Vol. 1, pp. 312, 313 18
California Jurisprudence, Volume 2, p. 237, et seq. .. 18
Constitution of the United States, 14th Amendment, 8, 14, 15
Corpus Juris, Volume 4, pp. 465, et seq 10, 18
Judicial Code, Section 237b, as amended by the Act of February 13, 1925 (43 Stat. 937) 7

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Charles T. Rule respectfully petitions, by his counsel, Kenneth E. Grant, for a writ of certiorari to review a decision of the Supreme Court of the State of California, 27 A. C. 131,[1] and 163 Pac. (2d) 443,[2] rendered November 1, 1945, which affirmed a judgment impressing a trust upon

[1] Advance California Opinions.
[2] Advance Pacific Opinions.

property distributed to petitioner as sole distributee of the estate of Sarah E. Weber, deceased, and awarding money judgments against him.

A

Summary Statement of the Matter Involved

Sarah E. Weber died at Los Angeles January 21, 1936, leaving neither issue, spouse, or parent surviving her (R. Vol. 9: 156). She left an estate appraised at $261,734.89 (R. 167). Petitioner, the youngest of her three brothers (R. 165), was named as sole beneficiary [3] under her last will and testament (R. 162).

The will was duly admitted to probate and on March 15, 1937, the Superior Court at Los Angeles, sitting in probate, entered its decree construing the will and distributing the entire estate to petitioner in his individual right (R. 163).

Some eighteen months after the decree of the probate court had become final the respondents other than Minnie B. Cotton commenced action against petitioner collaterally attacking the final decree of distribution (R. 144-173).

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[3] Various items of personal property were bequeathed to petitioner by Article Four of the will, but the bulk of the estate was devised and bequeathed to him as residuary legatee and devisee under Article Five (R. 161), reading as follows:

> "All the rest, residue and remainder of my estate, of whatever kind and character, and wheresoever situated at the time of my decease, I give, devise and bequeath as follows, to-wit:
>
> "(a) To my brother, Charles T. Rule, of Los Angeles, California, the whole thereof; and in the event he should fail to survive distribution to him, then to my heirs in accordance with the laws of succession of the State of California.
>
> "(b) The reason of making my brother, Charles T. Rule, aforesaid, the sole beneficiary of my estate, is that I am confident, and place my trust in him to the extent, that he will distribute my estate in accordance with my wishes he and I have often discussed."

They sued as statutory heirs of Mrs. Weber by virtue of their blood relationship to her predeceased husband (R. 144). They alleged:

> (1) that the final decree of distribution was erroneous in that (a) Article Five of the will attempted to devise and bequeath the residue in trust; (b) that said attempted devise and bequest failed; (c) that the residue became and was intestate property; and (d) should have been distributed to the heirs according to the laws of succession (R. 148);
>
> (2) that entry of the decree of distribution was induced by extrinsic fraud of petitioner (a) in failing to give proper notice of the probate proceedings (R. 150-151) and (b) in representing to the probate court that he was sole beneficiary under the will when he knew from the terms of the will that the residue of the estate was intestate property (R. 149-153).

Petitioner's demurrer to the first amended complaint was sustained without leave to amend and judgment of dismissal was entered against said respondents (R. 260). They tendered their second amended complaint (R. 172) and appealed from the judgment of dismissal (R. 260).

The District Court of Appeal, Third Appellate District, reversed. It ruled that while a close question was presented as to whether the allegations of the second amended complaint were sufficient to constitute extrinsic fraud, the probate court had erred in its construction of the will and its consequent distribution of the estate, and that respondents should be allowed reasonable time to amend (R. 260).

No amendment of the allegations of extrinsic fraud was made, however, and trial on the merits proceeded on the

second amended complaint as amended in other respects (R. 198-200, 210, 211). Before trial respondent Minnie B. Cotton, a niece of Mrs. Weber by a predeceased sister, who had been joined as a defendant, filed her cross-complaint against petitioner which in essence followed the allegations of the other respondents (R. 183-197).

On completion of trial the Superior Court, following the allegations of paragraph VII of the complaint (R. 148) and paragraph VI of the cross-complaint (R. 184-185), concluded as a matter of law:

> (1) that the probate court's decree of distribution was erroneous in distributing the residue to petitioner in that (a) Article Five of the will attempted to devise and bequeath the residue in trust; (b) that said attempted devise and bequest failed; (c) that said residue became and was intestate property; and (d) should have been distributed to the heirs according to the laws of succession (R. 235); and found in its findings of fact—
>
> (2) that the decree of distribution was induced by extrinsic fraud of petitioner (R. 219-226).

Judgment was entered impressing a trust upon all the real and personal property constituting the residue of the estate in the possession of petitioner—for respondent Cotton to the extent of a one-eighth interest, for respondent Sears to the extent of a one-fourth interest, and for the other respondents to the extent of a one-twentieth interest each (R. 243). Money judgments were also awarded—$14,641.26 to respondent Cotton, to respondent Sears, $38,282.50, and $7,856.50 to each of the other respondents (R. 248, 249).

Petitioner appealed from the judgment (R. 259), charging, among other things, that the trial court's findings

of extrinsic fraud and error in the probate decree were not supported by the evidence (R. 303). Disposition of the appeal was referred to the District Court of Appeal, Second Appellate District, which on August 28, 1944, reversed the judgment against petitioner (R. 271-280). It ruled that any cause of action which respondent Cotton might have had was barred by the statute of limitations (R. 276-280), and that the other respondents had by settlement agreements entered into with Mrs. Weber in her lifetime and following the death of her husband precluded themselves from asserting any interest in her estate as blood relatives of her predeceased husband (R. 73-77). For these reasons the District Court of Appeal held it was unnecessary to decide the other issues presented by petitioner's appeal.

Respondents sought hearing of the cause in the Supreme Court of California, which was granted on October 26, 1944 (R. 317). On November 1, 1945, the Supreme Court handed down its decision here complained of, by which it reversed the decision of the District Court of Appeal and affirmed the judgment of the trial court (R. 296-313).

The Supreme Court declared it unnecessary to pass upon the questions raised by petitioner's appeal as to the sufficiency of the evidence to support the trial court's findings that (1) the probate court had erred in construing the will and in distributing the estate; and (2) that entry of such decree was induced through extrinsic fraud of petitioner (R. 303). Thus it read out of the case the theory and cause of action which had theretofore been the basis of the litigation and of the judgment of the trial court.

The Supreme Court affirmed the judgment on the theory (1) that petitioner and his sister had in her lifetime, by an agreement collateral to her will, agreed that he should

take the residue of her estate in trust for beneficiaries agreed upon; (2) that the trial court had made no findings as to the terms, purposes and beneficiaries of the agreement and it was impossible, therefore, to enforce a trust in favor of the intended beneficiaries; (3) that the court was not concerned on the appeal with the rights of such intended beneficiaries, and that while respondents did not claim to be intended beneficiaries under any collateral agreement between petitioner and Mrs. Weber, the impressing of a trust in their favor, as heirs-at-law of Mrs. Weber, was proper to prevent unjust enrichment of petitioner (R. 302, 303).

Petitioner sought rehearing of the cause in the California Supreme Court (R. 317). As grounds for rehearing he asserted that the decision deprived him of his property without due process of law and denied him the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, in that:

> (1) the judgment was affirmed upon the theory of a wholly new and substituted cause of action never presented or relied on in the trial court or on appeal, which necessarily involved claims against petitioner and his property of which no reasonable notice was given him, as to which no judicial inquiry was made in the trial court, and against which he had no reasonable and proper opportunity to defend; and
>
> (2) that the action of the Supreme Court arbitrarily deprived him of his vested rights under the final decree of distribution of the probate court (R. 281-284).

The petition for rehearing was denied.

B

Statement Disclosing Basis of Jurisdiction

(1) Jurisdiction is invoked under Section 237B of the Judicial Code, as amended by Act of February 13, 1925 (43 Stat. 937).

(2) The judgment of the Supreme Court of California was entered November 1, 1945 (R. 296, 317). Petition for rehearing, timely filed, was denied November 29, 1945 (R. 318).

Time for filing petition for certiorari herein was duly extended by this Court to March 30, 1946 (R. 325).

(3) The case outlined in the Summary Statement presented no Federal question until rendition of the decision of the Supreme Court of California. The grounds of that decision "supplied a new and unexpected basis for a claim" by the petitioner "of the denial of a Federal right".[4] By his petition for rehearing in that court, that being the first opportunity presented, petitioner charged that the decision deprived him of his property without due process of law and denied him the equal protection of the laws contrary to the Fourteenth Amendment of the United States Constitution, and assigned such charge as a ground for rehearing (R. 281-284).

The Supreme Court of California rejected the contention and denied rehearing without opinion (R. 317-318).

The case presents a substantial question relating to judicial disregard of the guaranties of the Fourteenth Amendment. Petitioner, and his undersigned counsel, believe this petition to be well grounded, and the same is not presented for the purpose of delay.

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[4] *Great Northern Ry. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, *367*.

(4) The following cases are believed to sustain the jurisdiction of this Court under the circumstances:

Great Northern Ry. Co. v. *Sunbrust Oil & Ref. Co.*, 287 U. S. 358;

Brinkerhoff-Faries Trust & Savings Co. v. *Hill*, 281 U. S. 673;

Missouri ex rel. Missouri Ins. Co. v. *Gehner*, 281 U. S. 313.

C

The Questions Presented

Two questions are presented:

(1) Is not petitioner deprived of his property without due process of law and denied the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution, by the action of the California Supreme Court in affirming the judgment of the trial court on the theory of a cause of action evolved by the Supreme Court itself, which was not presented or relied on in the trial court or on appeal, and which has never been the subject of judicial inquiry or determination?

(2) Even assuming the right of the California Supreme Court to discard the theory and cause of action presented and relied on in the trial court and on appeal, is not the petitioner arbitrarily and without due process of law deprived of his vested rights under the final decree of distribution of the probate court, in violation of the Fourteenth Amendment to the United States Constitution, when the property distributed to him thereby is taken from him without judicial inquiry into or determination of the validity, or the terms, purposes or beneficiaries of the purported trust under an agreement collateral to the will and is given to respondents who do not claim to be beneficiaries under such purported agreement or trust?

D

The Reasons Relied on For Allowance of the Writ

Review on certiorari is asked because the stated questions have been decided by the California Supreme Court in a manner not in accord with applicable decisions of this Court.

(1) The action of the California court substantially denied petitioner his day in court and deprived him of his property without affording him an opportunity to be heard. Far more is involved than mere judicial error in the exercise of appellate jurisdiction.

For the purposes of its decision the California court discarded all consideration of (1) alleged error of the probate court in construing the will and distributing the estate of Mrs. Weber, and (2) relief from the final decree of distribution claimed to have been induced by extrinsic fraud. It thus discarded the theory and cause of action which constituted the basis and foundation of the judgment of the trial court. A new and different basis was substituted—namely, a cause of action predicated upon an express trust created by an agreement collateral to the will—of which no notice was given petitioner by appropriate pleading, against which he had no opportunity to be heard, and concerning which there was no judicial inquiry or determination in the trial court.

In *Brinkerhoff-Faries Trust & Savings Co.* v. *Hill*, 281 U. S. 673, 681, 682, this Court declared that while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law; that due process of law, in its primary sense, requires that the litigant be given an opportunity to present his case and be heard in its support. In *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267, this Court held that the inevitable result of affirmance of a

judgment by an appellate court on a ground or theory other than that relied upon in the court below was substantially to deny to a litigant his day in court and, in other words, was equivalent to condemning him without affording him an opportunity to be heard.

The California Supreme Court, in *Ernst* v. *Searle*, 218 Cal. 233, and more recently in *Gibson Properties Co.* v. *City of Oakland*, 12 Cal. (2d) 291, declared the rule to be well settled that the theory upon which a case is tried must be adhered to on appeal. The rule has been uniformly recognized and applied by the courts of other jurisdictions.[5] This Court has consistently recognized and applied the rule. In *Virginia* v. *Mullens*, 271 U. S. 220, 227, 228, it declared that after bringing and trying the case on one theory the plaintiff cannot be permitted on review to change to another which the defendant was not required to meet below. The basic reason for the rule rests upon the fundamental right of the litigant to have his day in court, as recognized by this Court in *Lutcher & Moore Lumber Co.* v. *Knight, supra.* To refuse to apply this universally recognized rule is not only to deny to the litigant due process of law in its primary sense, but also the equal protection of the laws.[6] More extended discussion will be found in the appended brief.

(2) Even assuming the right of the California court to discard the theory and cause of action presented and relied on in the court below and on appeal, still its decision arbitrarily and without due process of law deprives petitioner of his vested rights under the final decree of distribution of the probate court.

In *American Ry. Exp. Co.* v. *Kentucky*, 273 U. S. 269, 273, this Court declared that it cannot interfere with a judg-

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[5] 3 Am. Jur., pp. 35 et seq.; 4 C. J. S. Appeal and Error, pp. 465 et seq., and cases there cited.

[6] *Truax* v. *Corrigan*, 257 U. S. 312.

ment of a state court unless the judgment amounts to mere arbitrary or capricious exercise of power, or is in conflict with the fundamental principles established in our systems of jurisprudence for the protection of private rights. That the converse of the proposition is equally true was recognized by this Court in *Truax* v. *Corrigan, supra*, and *Hurtado* v. *California*, 110 U. S. 516.

The California court in introducing a new and different theory and ruling out of consideration the two basic elements of the trial court's decision found itself confronted with an anomalous situation, as disclosed by the following: The Court declared (1) that "respondents do not claim to be beneficiaries of the agreement"; (2) that "the trial court made no finding on the exact terms, purposes and beneficiaries of the agreement" (as it was not called upon to do by any issue presented to it); and (3) that therefore "it is impossible to enforce a trust in favor of the undisclosed * * * beneficiaries" (R. 303). In this situation, assuming that the subject of a trust created by a collateral agreement was properly before the court for consideration and determination, orderly and established procedure and a due regard for private rights called for a judicial determination of the validity of the purported collateral agreement, and of its terms, purposes and beneficiaries, before proceeding further upon the substituted theory and cause of action.

The California court, however, declared that it was not concerned with the rights of the beneficaries of such purported agreement; and without finding any invalidity in the purported collateral agreement, and upon the theory of preventing unjust enrichment of petitioner decreed that the property be given to all heirs, including respondents who admittedly "do not claim to be beneficiaries" under the purported agreement (R. 303).

In *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139, 161, this Court declared that all authorities agree that the due process of law guarantee inhibits the taking of one man's property and giving it to another contrary to the settled usages and modes of procedure, and without notice or an opportunity for a hearing.[7]

Further discussion of the matter will be found in the appended brief.

Wherefore, petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of California, to the end that this case may be reviewed and determined by this Court as provided by the statutes of the United States; and that the judgment herein of said Supreme Court of California be reversed by this Court; and for such other and further relief as to the Court may seem proper.

Dated: January 30, 1946.

CHARLES T. RULE,
Petitioner,
By KENNETH E. GRANT,
Counsel for Petitioner.

FRED N. ARNOLDY,
GEORGE T. WARREN,
HENRY H. DRAEGER,
Of Counsel.

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[7] Cf. *Railroad Retirement Board et al.* v. *Alton Railroad Co., et al.*, 295 U. S. 330, 357; cf. also *In re 620 Church Street Bldg. Corp.*, 299 U. S. 24; *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482; and *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, the basis of which is that due process will not permit the property rights of creditors to be invaded to allow stockholders to participate in corporate reorganizations.

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Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinions Below

The opinion of the District Court of Appeal on the first appeal, i.e., the appeal from the judgment of dismissal following sustaining of petitioner's demurrer, is reported in 45 Cal. App. (2d) 374, 114 Pac. (2d) 57 (R. 260-271). The opinion of the District Court of Appeal on appeal from the judgment on the merits, vacated by hearing granted by the Supreme Court of California, is found in 65 A. C. A. 821,[1] 151 Pac. (2d) 293 (R. 271-280).

[1] Advance California Appellate Opinions.

The opinion of the Supreme Court on the decision sought to be reviewed here is reported in 27 A. C. 131 [2] and 163 Pac. (2d) 443 (R. 296-313).

II

Jurisdiction

The basis of jurisdiction is given under heading "B" in the petition for writ of certiorari (*ante*, p. 7), and in the interest of brevity is incorporated here by reference.

III

Statement of the Case

A summary statement of the case appears under the heading "A" in the petition for writ of certiorari (*ante* p. 2), and in the interest of brevity is incorporated here by reference. Amplification of the statement appears in the course of argument.

IV

Specification of Errors

The Supreme Court of California erred:

1. In affirming the judgment of the trial court upon the theory of a cause of action evolved by the Supreme Court itself, which was not presented or relied on in the trial court or on appeal, and which has never been the subject of judicial inquiry or determination, thereby substantially depriving petitioner of his day in court and denying him the due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution.

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[2] Advance California Opinions.

2. In arbitrarily, and in disregard of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution, depriving petitioner of the property vested in him by the final decree of distribution of the probate court, and giving said property to persons not claiming to be beneficiaries of the purported trust created by an agreement collateral to the will (declared by the Supreme Court to be the basis of its decision) without judicial inquiry into and determination of the validity, or the purposes, terms and beneficiaries of such purported agreement or trust.

V

Summary of the Argument

Point 1. The action of the California Supreme Court in discarding the theory and cause of action presented and relied on in the trial court and on appeal, and substituting a new and different theory and cause of action, which has never been the subject of judicial inquiry or determination, substantially denies petitioner his day in court, condemns him without an opportunity to be heard, and denies him due process of law and the equal protection of the laws.

Point 2. Even assuming the right of the California Supreme Court to discard the theory and cause of action presented and relied on in the trial court and on appeal, its action arbitrarily and without due process of law deprives petitioner of the property vested in him by the final decree of distribution of the probate court by giving said property to respondents who do not claim to be beneficiaries under any purported collateral agreement (declared by said court to be the basis of its decision) without any judicial inquiry into or determination of the validity, or the purposes, terms and beneficiaries of such purported agreement or any trust resulting therefrom.

VI

Argument

Point 1

The action of the California Supreme Court in discarding the theory and cause of action presented and relied on in the trial court and on appeal, and substituting a new and different theory and cause of action which has never been the subject of judicial inquiry or determination, substantially denies petitioner his day in court, condemns him without an opportunity to be heard, and denies him due process of law and the equal protection of the laws.

It is elementary that the decree of distribution of the probate court, having become final, was conclusive as to the rights of all heirs, devisees and legatees, as to the interpretation of Mrs. Weber's will, and to the propriety of distribution of the entire estate to petitioner in his individual right. Right or wrong, the decree was final and conclusive upon the world.[3] It could not be collaterally attacked except for extrinsic fraud or jurisdictional defects. The respondents elected to launch a collateral attack on the ground of extrinsic fraud.

As pointed out by the Summary Statement (*ante* p. 2), respondents by the pleadings predicated their right of recovery upon (1) alleged error of the probate court in construing the will and in distributing the estate to petitioner (R. 148); and (2) alleged extrinsic fraud of petitioner in inducing the decree of distribution (R. 149-153). The District Court of Appeal so construed the second amended complaint on appeal from the judgment of dismissal following sustaining of petitioner's demurrer,

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[3] *Cook* v. *Cook*, 17 Cal. (2d) 639.

the first appeal in the case (R. 260-271). The pleadings were so construed and relied upon by the trial court. The foundation of the cause of action presented, relied on and acted on by it, is thus stated in paragraph V of the trial court's conclusions of law (R. 235), which follow the allegations of paragraph VII of the complaint (R. 148) and of paragraph VI of the cross-complaint (R. 184-185):

> "Article Five of the will of Sarah E. Weber attempted to devise and bequeath the residue of her estate to Charles T. Rule in trust, but said will did not name the object or purpose of said attempted trust, or identify the beneficiaries thereof, and said attempted devise and bequest in trust failed, and said residue became and was intestate property and should have been distributed by the Probate Court to plaintiffs, defendants and cross-complainants herein according to the laws of intestate succession of the State of California, and should not have been distributed by said court to said Charles T. Rule as his property."

That fundamental issue and its necessary concomitant, the issue of extrinsic fraud, were read out of the case by the California Supreme Court. It substituted, as a basis for its decision, a new theory or cause of action predicated upon an express trust created by an agreement collateral to the will, thus introducing a ground or issue that petitioner had not been called upon to meet, and which was not the subject of judicial inquiry or determination in the court below.

(a) *It is a fundamental rule, universally recognized and applied, that the theory and cause of action presented and relied upon in the court below must be strictly adhered to on appeal.*

Virginia v. *Mullens*, 271 U. S. 220;
Lutcher & Moore Lumber Co. v. *Knight*, 217 U. S. 257;
Ernst v. *Searle*, 218 Cal. 233;

Gibson Properties Co. v. *City of Oakland*, 12 Cal. (2d) 291;

Papinau v. *Security-First National Bank*, 6 Cal. (2d) 668;

Lamberson v. *Bashore*, 178 Cal. 321;

3 Am. Jur., pp. 35 *et seq.*, citing numerous cases;

4 C. J. S., Appeal and Error, pp. 465 *et seq.*, citing numerous cases.

In *Ernst* v. *Searle*, *supra*, at pages 240, 241, the California Supreme Court declared the rule as follows:

> "The rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court but manifestly unjust to the opposing litigant."

Recently the same court in *Gibson Properties Co.* v. *City of Oakland*, *supra*, at page 298, said:

> "It is well settled that the theory upon which a case was tried in the court below must be followed on appeal."

The California courts have uniformly upheld and applied the rule,[4] and the courts of other jurisdictions have recognized the rule as fundamental and firmly established.

The Supreme Court of Missouri, in *Duffley* v. *McCaskey*, 345 Mo. 550, 556, said it is "elementary law that a case must be submitted in the appellate court on the same theory upon which it was tried in the lower court." In *United States Fidelity & Guaranty Co.* v. *State*, 169 Okla. 59, 62, the Oklahoma Supreme Court declared it to be "a fundamental principle governing review" that on appeal "neither party

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[4] See California cases cited in 2 Cal. Jur. at pages 237 *et seq.*, and 1 Cal. Jur. Ten Year Supp., pp. 312, 313.

will be permitted to change the theory of his case and present it on a different theory than that upon which it was presented in the trial court." And in *Roof* v. *Rule*, 348 Ill. 370, 375, the Illinois Supreme Court said: "A complainant in a chancery suit cannot make one case by his bill in the lower court and on a review by a reviewing court be allowed to make another and entirely different one."

The following statement in *Flammer* v. *Morelli* (N. J. Ct. Err. and App.), 100 N. J. Law Rep. 314, 316, has particular application here:

> "A verdict erroneous on the theory adopted in the trial court cannot be sustained on a theory excluded in that court and which the jury had no opportunity to consider."

In line with the foregoing is the language of the United States Circuit Court of Appeals, Second Circuit, in *Osgoody* v. *Talmadge*, 45 Fed. (2d) 696, 697:

> "We must assume • • • that the complaint sets forth a cause of action for deceit inducing the making of the contract. There are two such charges. There is first the charge that defendants from the beginning had the purpose of not carrying out their promises. • • • *The judgment may not be sustained upon this charge, assuming it to state a cause of action, for no such issue was left to the jury, nor was the case tried upon this theory.* The same may be said of the second charge of fraudulent inducement. • • • Whether this was fraud we need not say. The action was tried, not on the theory of fraud in inducing the contract, but of fraud in carrying it out." (Italics ours.)

In the light of the uniformly accepted rule the judgment in the instant case cannot be sustained upon the theory evolved by the California Supreme Court, for such theory or issue was never presented by pleading, nor was the case tried, considered or determined by the trial court upon such theory or issue.

(b) *The primary and fundamental reason underlying the salutary rule of the cited cases is to prevent injustice and to insure to the litigant his day in court and an opportunity to be heard upon due notice of the charges he is required to meet.*

This was the reason recognized by this Court in *Virginia* v. *Mullens*, 271 U. S. 220, 227, 228. The Court there said:

> "The case stated in the complaint was distinctly in tort. There was no mention of a contract obligation; nor any reference to either of the two deeds. And when the court came to charge the jury, the plaintiff tendered and the court included in its charge various instructions wherein the case was treated, in keeping with the complaint, as one to recover damages for an alleged tortious creation and continuance of a nuisance. *After bringing and trying the case on that theory the plaintiff cannot be permitted on this review to change to another which the defendant was not required to meet below.*" (Italics ours.)

The primary reason for the rule was plainly declared by this Court in *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, where it said, at pages 264, 266, 267:

> "The circuit court of appeals affirmed the judgment of the trial court, and the opinion delivered by it is as follows: 'By the court: After a thorough and attentive consideration of the questions raised on this writ, we are of opinion that the matters of defense relied upon by plaintiffs in error on the trial below, in so far as they were not given consideration, were of an equitable nature, not cognizable in a court of law. We therefore affirm the judgment of the circuit court' * * *.
>
> "The decision of the question before us is controlled by the case of *Burbank* vs. *Bigelow*, 154 U. S. 558, Appx and 19 L. Ed. 51. That was an action at law in which the plaintiff recovered judgment. In this court, for the

first time, the objection was made by the unsuccessful party that the matter of the demand of plaintiff was one of equitable cognizance. The court, however, said: 'The objection that the matter of plaintiff's demand is one of equitable cognizance in the Federal Courts cannot prevail. No such objection was raised in the court below at any stage of the proceedings, and it cannot be permitted to a defendant to go to trial before a jury on the facts of a case involving fraud, and let it proceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in this court.'

"Applying this doctrine to the facts and circumstances which we have previously stated, we are of opinion that it inevitably results that the effect of the action of the circuit court of appeals was substantially to deny to the plaintiffs in error in that court, the petitioners here, their day in court; in other words, was equivalent to condemning them without affording them an opportunity to be heard." (Italics ours.)

As already disclosed, the California Supreme Court, in *Ernst* v. *Searle, supra*, declared that to permit a party to change his position and adopt a new and different theory on appeal would be manifestly unjust to the opposing litigant. What the parties themselves will not be permitted to do, the appellate court may not do on its own motion,[5] for such action strikes down the fundamental right of the litigant to be heard upon due notice of the charges he is required to meet, and violates the due process of law clause in its primary and most fundamental aspect.

Reynolds v. *Stockton*, 140 U. S. 254, 268, 269;
Coe v. *Armour Fertilizer Works*, 237 U. S. 413, 425, 426;
Standard Oil Co. v *Missouri, ex rel. Hadley*, 224 U. S. 272, 282;
Windsor v. *McVeigh*, 93 U. S. 274, 282.

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[5] *Lutcher & Moore Lumber Co.* v. *Knight, supra.*

This Court said in *Truax* v. *Corrigan,* 257 U. S. 312, 332:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law,—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

And in *Brinkerhoff-Faries Trust & Savings Co.* v. *Hill,* 281 U. S. 673, this Court said, at pages 681, 682:

> "We are not now concerned with the rights of the plaintiff on the merits * * *. Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support. * * * While it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law."

(c) *The Court's refusal to adhere to and apply the long established and universally recognized and applied rule under discussion also deprives the petitioner of the equal protection of the law.*

In *Truax* v. *Corrigan, supra,* this Court said, at page 332:

> "*Our whole system of law is predicated on the general fundamental principle of equality of application of the law.* * * * But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.
>
> "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality on the

other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. * * * *Thus the guaranty was intended to secure equality of protection not only for all, but against all similarly situated.* Indeed, protection is not protection unless it does so." (Italics ours.)

(d) *The theory and cause of action substituted by the California Supreme Court was never presented or relied on in the trial court.*

Contrary to the statement of the decision (R. 303), respondents did not plead the cause of action which the California Supreme Court makes the basis of decision. Nor, again contrary to the statement of the decision (R. Vol. 11:300), did respondents plead "that the testatrix intended to give petitioner the residue in trust only," or "that he had agreed with her to distribute the property in accordance with their previous understanding," or "that a 'secret trust' was thereby created." The pleadings disclose no such allegations (R. 144-160, 183-195).

Respondents did not rely on a secret trust or collateral agreement as the basis of their right of recovery. Nor, as the decision states (R. 300), did they "urge the existence of the agreement * * * as a part of their proof in establishing intestacy." On the contrary they pleaded and relied on an entirely different basis of recovery. Their pleadings disclose that they relied on the terms of the will itself to establish intestacy (complaint, paragraph VII, R. 148; cross-complaint, paragraph VI, R. 184-185), and on their charges of extrinsic fraud to permit correction of the alleged error of the probate court in construing the will and distributing the estate (R. 149-153, 187-191).

In the trial court the inquiry as to any understanding between Mrs. Weber and petitioner concerning her intentions with respect to her estate was restricted, and evidence along those lines was only admitted, in the language of

the trial court, "because of the issue * * * as to whether there was any conscious fraud" (R. 110, lines —; see also 6).

On appeal, again, the matter of an agreement or understanding between petitioner and his sister has been urged only with reference to the issue of extrinsic fraud.[6] Petitioner's position on appeal has been, first, that the evidence disclosed no understanding or agreement which could have been concealed from the probate court; and, second, that if any agreement did exist, it was not a matter with which the probate court was concerned, and consequently the purported agreement afforded no basis for extrinsic fraud.[7]

What petitioner has outlined above under this subdivision is admittedly correct, for the decision admits that the theory upon which the California Supreme Court affirmed the judgment is not "identical" with that "relied upon by plaintiffs or the trial court" (R. 303).

Clearly, the California court pursued an arbitrary and unprecedented course in substituting for the purposes of its decision an entirely new theory and cause of action which was never presented, relied on or acted on in the trial court. The language of the Circuit Court of Appeals for the Eighth Circuit in *Atlantic Brewing Co.* v. *Grocery Co.*, 79 Fed. (2d) 45, at 47, is particularly applicable. That court said, in part:

> "By their pleadings and their actions during the trial the parties to an action create the issues which they are permitted to present upon appeal. Those issues must be clearly presented to the trial court or

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[6] Copies of the briefs before the California Supreme Court have been filed with the Clerk, marked "Volume 10." The points raised on appeal by petitioner are indicated at pages 11-13 of Appellant's Opening Brief; the position of respondent Cotton is stated at pages 2 and 3 of Cross-Complainant's and Respondent's Reply Brief; and the other respondents stated their position at page 3 of Plaintiffs' Reply Brief.

[7] The correctness of this second contention is conceded by the opinion of the Supreme Court, and is full answer to any claim of fraud upon the probate court (R. 302).

> they are (barring jurisdictional matters) deemed waived. * * *. It is unfair to the orderly administration of justice—as affecting the other party to the suit, litigants having other cases before the court, and the courts as agencies of justice—to permit any other procedure. *To do otherwise would open wide the door to trickery, imposition and unfair harassment of litigants and courts.* * * *." (Italics ours.)

POINT 2

Even assuming the right of the California Supreme Court to discard the theory and cause of action presented and relied on in the court below and on appeal, still its decision arbitrarily and without due process of law deprives petitioner of the property vested in him by the final decree of distribution of the probate court, by giving said property to persons not claiming to be beneficiaries under the purported collateral agreement (declared by said court to be the basis of its decision) without any judicial inquiry into or determination of the validity, or the purposes, terms and beneficiaries of such purported agreement or any trust resulting therefrom.

For the purpose of its decision the California Supreme Court discarded respondents' cause of action based on alleged extrinsic fraud. It supplanted that cause of action with one predicated upon an express trust presumed to have resulted from an agreement between petitioner and his sister, collateral to her will, that he would take the residue of her estate in trust.

To construct a basis for its adopted theory and cause of action the California court isolated and seized upon a finding made by the trial court in support of the charge of extrinsic fraud, i. e., that petitioner knew that his sister intended to leave him the residue of the estate "in trust only" for the beneficiaries previously agreed upon and understood between herself and Charles T. Rule" (R.

219). A component part of that finding, namely, that petitioner concealed this knowledge from the probate court, and thereby perpetrated a fraud upon the court and upon plaintiffs (R. 219-221), was ignored by the Supreme Court. Making use of the part seized upon as the basis for its action, it held that "under these facts a constructive trust arose when the property was distributed to defendant by the probate court." It pointed out that such a trust is enforced without collateral attack on the probate decree, and ruled out of consideration the two basic elements of the trial court's decision (R. Vol. 11: 227).

In doing so the California court was confronted with the fact that the trial court had made no findings as to the terms, purposes or beneficiaries of any such collateral agreement, or any trust based thereon, and had made no judicial inquiry into or determination of their validity. The failure of the trial court to make such findings or determination was, of course, due to the fact that it was not confronted with such issues. In this situation, orderly procedure and a due regard for private rights required a judicial determination of these facts before proceeding further upon the substituted theory. The California court, however, declared it was not "concerned with the rights" of the intended beneficiaries, and while itself declaring no invalidity in the purported agreement or any trust based thereon, proceeded to award the property to the heirs of the decedent "in order to prevent unjust enrichment" of petitioner (R. 303).

This was done despite the declaration of the court that respondents "do not claim to be beneficiaries" under any purported agreement, or any trust created thereby. In other words, not only did they not predicate their action on any collateral agreement, but they are strangers to one if it existed.

It is not disputed that where property is devised to one upon his agreement to apply it for another, equity will impress a trust for the intended beneficiary, if necessary. This is the rule of the cases cited in the decision of the California court (R. 302).

The rule affords no support for the court's action since respondents admittedly are not third party beneficiaries of any agreement or trust. Nor can the award of the property to respondents be justified because they are heirs-at-law, for the court declares no invalidity in the purported agreement or any trust based thereon, and no judicial inquiry or determination as to their validity was made by the trial court.

Absent requisite judicial inquiry and determination as to the terms of the purported agreement, as to its validity and the validity of any trust thereunder, the California Supreme Court had no basis upon which to declare the rights either of petitioner or respondents in the property in controversy. Without such determination it had no basis for its conclusion that petitioner was "unjustly enriched." Even on its substituted theory and cause of action it acted without that "informed, independent judgment" that due process of law demands.[8] Affirmance of the judgment against petitioner under such circumstances constitutes mere judicial confiscation of the property vested in him by the final decree of the probate court. It involves substantial denial of due process of law.[9] Without inquiry into and a judicial determination of the invalidity of the purported agreement or any trust thereunder respondents are patently without interest in the property in

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[8] cf. *Consolidated Rock Products Co.* v. *du Bois,* 312 U. S. 510, 520; *National Surety Co.* v. *Coriell,* 289 U. S. 426, 436.

[9] cf. *Railroad Retirement Board et al.* v. *Alton Railroad Co. et al.,* 295 U. S. 330, 357; *Louisville Joint Stock Bank* v. *Radford,* 174 U. S. 674.

controversy. Without such determination they have no standing in a court of equity.[10]

The money judgments must meet the same condemnation, for they represent only respondents' purported interest in property disposed of by petitioner.

The primary purpose of the due process of law guaranty is the security of the individual from the arbitrary exercise of the powers of government.[11] The principle underlying this guaranty was originally designed to secure the subject against the arbitrary action of the Crown and antedates Magna Charta, as pointed out by this Court in *Ochoa* v. *Hernandez y Morales*, 230 U. S. 139. In that case this Court said further, at page 161:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. * * * *Whatever else may be uncertain about the definition of the term 'due process of law', all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to the settled usages and modes of procedure, and without notice or an opportunity for a hearing.*" (Italics ours.)

In *Barbier* v. *Connolly*, 113 U. S. 28, 31, this Court said that the due process clause of the Fourteenth Amendment undoubtedly intended that there should be no "arbitrary spoliation of property."

To summarize, there was here an "arbitrary spoliation of property" and the arbitrary "taking of one man's property and giving it to another, contrary to the settled usages and modes of procedure." As pointed out, the decree of

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[10] In *Swallow* v. *Tungsten Products Co.*, 205 Cal. 207, 217, the Supreme Court of California said: "It is essential that a party complaining in equity should have some present substantial interest in the subject matter of the suit. He must have a direct interest in the result of the litigation, and his complaint must clearly indicate that fact."

[11] *Hurtado* v. *California*, 110 U. S. 516.

distribution of the probate court had become final and conclusive and petitioner's rights thereunder were vested property rights. Under settled usages and modes of procedure he could lawfully be deprived of these rights only:

1. Upon a judicial determination that the decree was erroneous, and that there were jurisdictional defects or that the decree was procured through extrinsic fraud;[12] or

2. Without an attack upon the decree, and proceeding upon the theory that there was a trust created by collateral agreement:

(a) At the instance of persons claiming to be beneficiaries thereof upon a judicial determination that they were such beneficiaries; or

(b) At the instance of the heirs of the decedent upon a judicial determination that such trust created by collateral agreement was invalid.

Here the cause of action pleaded under paragraph 1 above was ruled out of consideration. Paragraph 2(a) has no application because plaintiffs neither claimed nor were found to be beneficiaries of such a trust. And there was not, under paragraph 2(b), any judicial inquiry into or determination of the invalidity of any trust created by collateral agreement.

There was, of course, under the cause of action presented by the pleadings, judicial inquiry into and determination of the invalidity of the trust which the trial court found Mrs. Weber attempted to create by ARTICLE FIVE of the will, independent of the existence of a collateral agreement, but the effect of this was merely to hold that the probate court had erred in making its distribution of the residue. As to this, however, the decree remains final and conclusive

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[12] *Cook* v. *Cook*, *supra*.

in the absence of any final determination that the decree was procured through extrinsic fraud.

Assuming that there was here, by virtue of paragraph VI of the trial court's findings (R. 214), based on evidence admitted only for the purpose of giving support to the claim of extrinsic fraud, a determination of the existence of a trust created by collateral agreement, nevertheless, there was lacking judicial inquiry into and determination of the other essential element, to-wit: the invalidity of the trust created by the purported agreement, which, of course, required inquiry into and a determination of its terms and purposes.

In *American Railway Exp. Co.* v. *Kentucky*, 273 U. S. 269, this Court said, at page 273:

> "We cannot interfere unless the judgment amounts to mere arbitrary or capricious exercise of power or is in clear conflict with those fundamental 'principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' "

The converse is equally true. Again we quote the fundamental rule declared by this Court in *Truax* v. *Corrigan*, *supra*, at page 332:

> "The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law—a law which hears before it condemns, which proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society."

The procedure of the California Supreme Court violates the Fourteenth Amendment in the respects discussed under both Point 1 and Point 2.

Petitioner closes with the following apt language of this Court in *Powell* v. *Alabama*, 287 U. S. 45, 67:

> "It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirements of due process of law. * * * In Holden vs. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 S. Ct. 383, the necessity of due notice and an opportunity to be heard is described as among the 'immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' And Mr. Justice Field, in an earlier case, Galpin vs. Page, 18 Wall 350, 368, 369, 21 L. ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "

Conclusion

WHEREFORE, it is respectfully submitted that the petition for writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 1024

CHARLES T. RULE,

Petitioner,

vs.

HATTIE SEARS, EDWIN E. WEBER, MINNIE LOUISE MATTOCKS, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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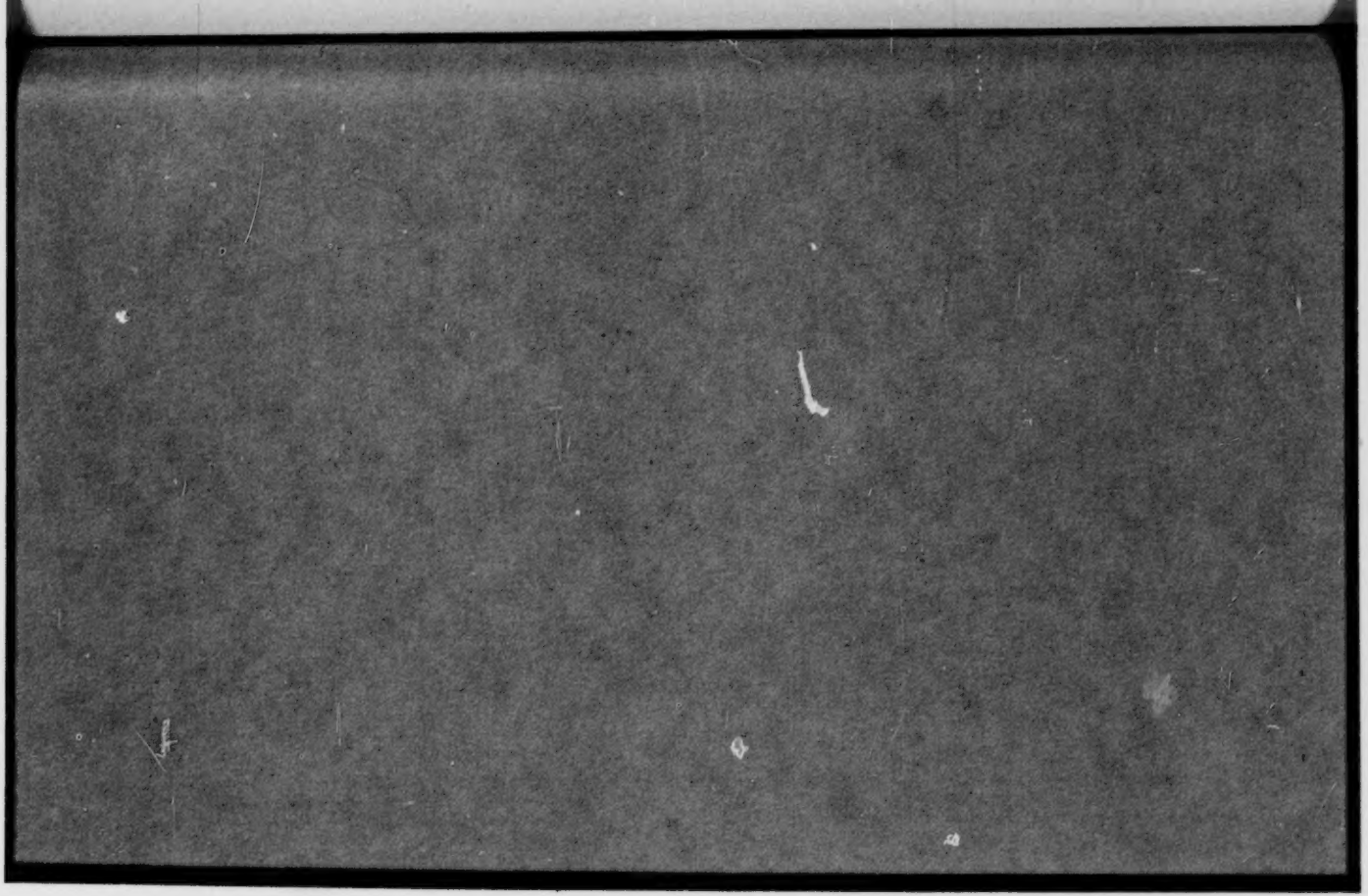

SUBJECT INDEX.

PAGE

I.

The case as made below and as treated by the Supreme Court of California on the appeal..... 2

II.

Petitioner has had his day in court upon the issue of a collateral or secret agreement to create a trust and upon every other issue involved in the case, including that of extrinsic fraud.... 5

III.

Petitioner acquired no vested rights under the decree of distribution, for the Probate Court was without jurisdiction to declare the equities under which respondents claimed, as held by the California Supreme Court..... 15

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Bjornquist v. Barton & A. R. Co., 250 Fed. 929; cert. den. 248 U. S. 593 14
Bryant, Estate of, 3 Cal. (2d) 70 19
Curdy v. Berton, 79 Cal. 420 17
Davey v. So. Pacific Co., 116 Cal. 325 14
Gillette v. Gillette, 122 Cal. App. 640 16
Hubbell, Estate of, 121 Cal. App. 38 ..... 15, 16
Martin v. Imbrie, 262 Fed. 44 13
McLellan, Estate of, 8 (2d) 49 15
Fleishacker v. Blum, 109 F. (2d) 542; cert. den. 311 U. S. 665 14
Houle v. Helena Gas & Elec. Co., 31 F. (2d) 671 14
Lauricella v. Lauricella, 161 Cal. 61 17
Lyons v. Empire Fuel Co., 262 Fed. 465 14
Parkman v. Superior Court, 77 Cal. App. 321 15
Peck v. Noee, 154 Cal. 351 14
Prior v. Andrews, 83 Cal. App. 782 17
Rey, Estate of, 31 Cal. App. (2d) 648 16
San Juan Light Co. v. Requena, 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680 14
Sears v. Rule, 45 Cal. App. (2d) 374 5

STATUTES.

California Code of Civil Procedure, Sec. 1699 15
California Constitution, Art. VI, Sec. 4½ 14
California Constitution, Art. VI, Sec. 5 15
California Probate Code, Secs. 300-1242 15
California Probate Code, Sec. 1120 ..... 15, 16

TEXTBOOKS.

2 California Jurisprudence, p. 240 14
2 California Jurisprudence, p. 809 14
Restatement of the Law of Trusts, Sec. 54d 4, 18
Restatement of the Law of Trusts, Sec. 55h 4, 18
Restatement of the Law of Trusts, Sec. 411q 4, 18
1 Scott on Trusts, p. 312 18

IN THE

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vs.

HATTIE SEARS, EDWIN E. WEBER, MINNIE LOUISE MATTOCKS, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

It is respectfully submitted that the petition for certiorari herein should be denied.

Under petitioner's Point 1 it is claimed that he has been unconstitutionally deprived of his day in court because, it is said, the California Supreme Court discarded the "theory and cause of action" presented and relied upon below and substituted "a new and different" theory and cause of action which has never been the subject of judicial inquiry or determination.

Under his Point 2 it is claimed that in any event the California Supreme Court unconstitutionally deprived him of the property vested in him by the earlier decree of the probate court by giving the property (distributed outright to him by the probate court) to persons other

than the beneficiaries under the collateral agreement declared by it to be the basis of its decision and without judicial inquiry into the validity, purposes, terms or beneficiaries of such "purported" agreement or of any trust resulting therefrom.

Neither point possesses merit. In order adequately to answer them, however, it will be necessary to devote some attention to the case as made below, and to the California Supreme Court's treatment of it on the appeal.

I.

The Case as Made Below and as Treated by the Supreme Court of California on the Appeal.

The case pleaded, proved and found in the trial court showed (1) that plaintiffs and cross-complainant Cotton (we shall hereinafter refer to these parties collectively as "respondents") were heirs-at-law of the decedent Sarah E. Weber; (2) that the latter left a will; (3) that although the will named petitioner Rule as sole residuary devisee, *it was not the intention of the decedent that he should take outright, but that he should take for undisclosed persons previously agreed upon between them;** (4) that petitioner denied having made any such agreement and claimed the assets of the estate for himself; and (5) that by divers and extrinsic frauds and concealments, not necessary here to be detailed, he prevented respondents from presenting their claims to the probate court, thus procuring distribution to himself outright.

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*This is the issue as to which petitioner asserts he has never had his day in court. We shall show, by adequate record citations, that the issue has been present from the beginning, to the knowledge of petitioner and his counsel.

Judgment going against him, petitioner appealed and relied most strongly upon the proposition that the decree of distribution was *res adjudicata* and as such could not be avoided except for extrinsic fraud. (See, for example, Vol. 10 herein, Apps. Reply Brief in 2d Civil No. 14280, pp. 3-8.)

When the case arrived in the Supreme Court of California, that court held that the decree of distribution was not *res adjudicata* (for want of jurisdiction in a California probate court to adjudicate equitable claims such as are here involved) and, hence, the decree not being binding, there was no necessity for passing upon the sufficiency of the evidence to support the findings as to extrinsic fraud. [R. 302-303.] It then proceeded to hold that upon the other facts found, and specifically the facts concerning a collateral agreement on the part of petitioner to distribute to unnamed and unascertained beneficiaries, a constructive [or *resulting:* compare R. 299, 303] trust arose for the benefit of the heirs at law of the decedent, namely, these respondents. [R. 302-303.]

The result is that petitioner is in reality here claiming no more than that the California Supreme Court erred, in the exercise of its jurisdiction under California law, in holding that the probate decree of jurisdiction was not *res adjudicata* and hence that the issue as to the presence or absence of extrinsic fraud as a vehicle for avoiding the decree was wholly immaterial. But what petitioner industriously ignores is the patent fact that the holding of the California Supreme Court (that a decision upon the question of extrinsic fraud was unnecessary) merely emphasizes the presence from the beginning of the essentials of the cause of action upon which the respondents were permitted to recover.

Ignoring, as we may, for purposes of reality, the actual order in which the issues were presented, the relative claims of the parties were these:

1. *Cause of Action* predicated upon the right of heirs-at-law to claim a resulting trust where a testatrix attempts, by collateral agreement with a devisee evidenced, *inter alia,* by the will itself, to create a trust which fails for uncertainty and noncompliance with the Statute of Wills. See, for instance, Restatement, Trusts, § 54d, § 55h, § 411q.

2. *Defense* predicated upon finality of the probate decree distributing absolutely to the devisee.

3. *Replication* in avoidance of the effect of the decree, that the same was procured by extrinsic fraud.

Such was the true rationale of the issues, notwithstanding the fact that respondents pleaded extrinsic fraud at the outset which was denied by petitioner in his responsive pleadings. It is perfectly obvious, therefore, that the primary right constituting the basis of respondents' cause of action was necessarily their right to have a trust impressed upon petitioner as being the person in possession of property which in equity belonged to them. It is equally obvious that, unless they had possessed such primary right, the question of extrinsic fraud could never have arisen, for if they had possessed no right capable of being violated, respondents could not have been defrauded. It thus becomes manifest that the only function of extrinsic fraud in the case was as a vehicle to avoid whatever effect the decree of distribution had upon the respondents' rights. And it follows that when the Supreme Court, adversely to petitioner's contentions, held that the decree was *not* conclusive, due to want of juris-

diction in the probate court to adjudicate the presence of a resulting trust, the issue of extrinsic fraud became utterly superfluous.

We now propose to show that not only was the issue as to a collateral or secret agreement (evidencing an attempt to create a trust which failed) present in the case from the inception, but that petitioner knew it and attempted to meet the issue, thereby clearly having his day in court.

II.

Petitioner Has Had His Day in Court Upon the Issue of a Collateral or Secret Agreement to Create a Trust and Upon Every Other Issue Involved in the Case, Including That of Extrinsic Fraud.

It will be borne in mind that prior to the trial which resulted in the judgment against petitioner, there had been a previous appeal from a judgment rendered after demurrer sustained to the plaintiff's original complaint. *Sears v. Rule,* 45 Cal. App. (2d) 374; [R. 260-271].

The briefs on that appeal clearly show that the issue of the collateral or secret agreement was directly presented to, and decided by the District Court of Appeal.

The briefs in question consisted of an Appellants' Opening Brief, a Reply Brief filed by petitioner herein, and, after decision of the court sustaining the complaint, a Petition for Rehearing also filed by petitioner. Certified copies of those two briefs and of that petition are collectively filed herein as Respondents' Exhibit "A."

Respondents herein, in their "Plaintiffs' Opening Brief" devoted an entire topic to the identical theory

upon which the judgment herein was later affirmed by the California Supreme Court. On page 95 of that brief (see Exhibit "A" herein) appears the following:

"POINT IV.

"PLAINTIFFS HAVE A CAUSE OF ACTION EVEN IN THE ABSENCE OF MISTAKE OR FRAUD. THE SUIT SHOULD NOT HAVE BEEN DISMISSED.

"Even if the complaint did not allege that the Decree of Distribution was obtained through mistake or extrinsic fraud, the plaintiffs still have a cause of action, and the demurrer should not have been sustained.

The complaint alleges the defendant took the residue charged with a trust; it alleges he has repudiated the trust and claims the entire residue as his own. The intended beneficiaries being unnamed and unknown, equity therefore will decree that he holds it, not for himself, but as trustee for the intestate heirs of the deceased . . ."

Petitioner herein, in his Reply Brief (see Exhibit A, herein), also discussed the secret collateral agreement. He stated:

"No attempt is made to allege a secret trust was intended, or that the plaintiffs were the beneficiaries thereunder, or were secretly named, or that defendant made any promise with respect to such devises or bequests." (Exhibit A, p. 4.)

Pages 19-22 of that brief are devoted to his topic entitled:

"The test for the creation of a secret trust is, First, the intention to create a trust for someone, and, Second, the promise, express or implied, by the legatee to carry it out."

The complaint of course, does allege a secret or collateral agreement.* For instance, Paragraph IX alleges that, as to the residue, petitioner well knew that the said testatrix had in mind other beneficiaries than himself and that he was not the sole beneficiary. [R. 152-153.] Similar allegations appear in Paragraph VI of the cross-complaint of respondent Minnie Cotton. [R. 184-185.] In Paragraph VI of the complaint it is alleged, by reference to the will, that petitioner was made the "sole beneficiary" of the estate to "distribute" it in accordance with the "wishes" of the testatrix "often discussed" by them. The complaint prays that he be held as trustee for the benefit of the heirs at law.

The District Court of Appeal, in its decision [R. 260] stated the following concerning the complaint:

> "The theory that the testatrix . . . intended to convey the residue . . . to him in trust to be distributed in accordance with their previous agreement, seems conclusive . . ." [R. 266.]
>
> "Moreover it is apparent the respondent knew the testratrix did not intend to make him the sole beneficiary of her estate . . ." [R. 267.]

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*It should be pointed out that *the will itself* evidenced the existence of such an agreement:

"ARTICLE FIVE.

* * * * * * * * * * *

"(b) The reason of making my brother, Charles T. Rule, the sole beneficiary of my estate is that I am confident, and place my trust in him to the extent, that he will distribute my estate in accordance with my wishes he and I have often discussed."

". . . the allegations of the complaint . . . clearly show that it was not the intention that Charles T. Rule should become the sole beneficiary of his sister's will . . ." [R. 270-271.]

Petitioner, in his Petition for Rehearing by the District Court of Appeal (Exhibit A herein), stated:

"V. The court erred in holding that a secret agreement was alleged or existed . . ." (p. 2)

". . . the court has not sought to discover the intention from the language of the will, but from the purported agreement alleged by counsel and referred to as a secret trust in the brief under that heading at pages 46 to 56." (p. 26.)

After his petition for rehearing was denied, petitioner herein filed in the Supreme Court of California a petition for a hearing by that court. (See Vol. 11 herein.) On page 4 of that petition he stated:

"(2) The decision of the District Court is erroneous in that it is predicated upon the court's conclusion that a secret agreement existed between the testatrix and her brother, Charles T. Rule . . ."

The District Court of Appeal reversed, and sent the case back for trial. The following references to the record show that petitioner's counsel were fully aware of the presence of the issue as to a collateral or secret agreement.

For instance petitioner himself admitted the secret trust. He testified in part as follows:

"Q. This will, I presume, Mr. Rule, was drawn for the purpose of trying to carry out the wishes of Sarah Weber? . . . A. Yes."

Q. And you had discussed with your sister, as stated here in the will, what those wishes were? A. Yes." [R. 32-33.]

* * * * * * * *

"Q. Those wishes were only disclosed to you in conversations with your sister? A. Yes, sir, that is correct." [R. 37.]

* * * * * * * *

"A. He (Henry Draeger) told me . . . that my sister had often talked about she wanted me to distribute the estate." [R. 5.]

* * * * * * * *

"The Court: Hadn't Mrs. Weber, before she died, told you about how you should divide that property? A. Yes." [R. 5.]

* * * * * * * *

The petitioner admitted he had, in another action, testified as follows:

"Q. And was any explanation made of the legal effects or legal meaning of any of the phrases used in that will? A. I do not recall at that time. Later Mr. Draeger went into that. . . .

Q. Do you recall what he explained? A. Yes, about the trust.

Q. About everything going to you in trust? A. Yes." [R. 4.]

* * * * * * * *

Edwin Weber, a witness testified:

"A. Oh, I asked him (Mr. Rule) what the instructions of Sarah was to him as to the distribu-

tion of the estate; and he said that that was what he knew and it was nobody else's business." [R. 58.]

* * * * * * * *

Mr. Warren, attorney for petitioner, in addressing the trial court, stated in part:

". . . the Appellate Court said there are some allegations in here there was a secret agreement between this Mr. Rule and Sarah Weber. Now, if there is a secret agreement, the foundation of this whole thing by the decision of this Court is that there existed a secret agreement which was concealed from the court. Now, that would take a conversation between Sarah Weber and Charles T. Rule . . ." [R. 104.]

If any further evidence were needed as to the fact that pettiioner has fully had his day in court upon the question of a collateral agreement as constituting the basis of respondent's right to recover, the following from the findings of the trial court is eloquent [R. 219]:

". . . At the death of Sarah E. Weber, Charles T. Rule knew that Sarah E. Weber did not intend by said will to devise and bequeath the residue of her estate to him absolutely, and he knew that she intended by said will to devise and bequeath the residue of her estate to him in trust only, for the beneficiaries previously agreed upon and understood between herself and Charles T. Rule.

"Prior to her death, Sarah E. Weber discussed each provision of her said will with Charles T. Rule,

and she told him the manner in which she wanted him to distribute the residue of her estate. Charles T. Rule agreed, and told her he would distribute the same in accordance with her said wishes and directions. Sarah E. Weber, when she executed said last will and testament, and at her death, had confidence in Charles T. Rule, and trusted that he would distribute the residue of her estate in accordance with her said wishes, which she had discussed with him, and his agreement with her."

In respondents' brief in the appeal after the trial of the case, we devoted pages 7 to 25, to a discussion of the evidence supporting the finding regarding the secret trust (see Vol. 10 herein).

Petitioner herein, in his opening brief in that appeal, challenged the finding of the trial court and stated at page 94 (see Vol. 10 herein):

". . . the alleged agreement on his part with respect to distribution of the estate was simply non-existent."

Petitioner herein, in his reply brief in the appeal from the judgment, stated the following (see Vol. 10 herein):

"*The existence of non-existence of a collateral agreement* between Mrs. Weber and Mr. Rule by which it was agreed that he was to take the residue of her estate as a trustee and not in his individual right, *is clearly the crux of the issue of fraud on this appeal.*" (Br. p. 24.)

It is also pertinent to add that the foregoing quotation is taken from a section of the brief which is headed:

> "C. There Was No Collateral Agreement or Trust."

It might also be noted that on page 28 of the same brief petitioner has another topic entitled:

> "D. The Evidence Affirmatively Established the Non-existence of Any Collateral Agreement."

under which he said:

> ". . . It is apparent that any evidence of discussions between them was competent and material—not as declarations of the decedent for the purpose of construing her will, for that would be contrary to Section 105, Probate Code—*but as competent evidence to prove or disprove the existence of the collateral agreement which is essential to any possible cause of action of the respondents.*"

On page 11 of the same brief, petitioner herein stated:

> "It thus appears that the alleged fraud falls into two categories, first . . . and, second, the fraud of appellant in . . . concealing his knowledge of an agreement between him and Mrs. Weber to distribute the property according to some previous understanding."

In view of the foregoing uncontrovertible evidence that the existence of a collateral agreement has always been implicit in respondents' recovery, it is submitted that petitioner's claim that the California Supreme Court "sub-

stituted" a new and different theory and cause of action upon which petitioner has never had his day in court is wholly without merit. The basic issue has always been present, and, it was, as petitioner stated in his said reply brief *"the crux of the issue of fraud"* (see Vol. 10 herein). The presence or absence of the issue of extrinsic fraud depended only upon whether petitioner was right or wrong in his contention that the decree of distribution was *res adjudicata.* The California Supreme Court held he was wrong; and it held correctly, as we shall show in our discussion of petitioners' Point 2. But whether its holding in this respect was right or wrong, no question of due process arises, for petitioner has had his day in court *on every issue involved in the case, including the issue of extrinsic fraud.* For this reason we have deemed it unnecessary to discuss the authorities mentioned by petitioner in this connection.

It might be stated in passing, that even if the complaint herein had failed to plead the existence of the secret or collateral agreement, as contended by petitioner, which contention we deny, the assertions of petitioner are still without merit. The issue of the collateral agreement was tried and findings were made with respect thereto, and, as the Court stated in *Martin v. Imbrie,* 262 Fed. 44-47:

> "Effect must therefore be given to the rule that where the parties, with the assent of the court, united in trying a case on the theory that a particular matter is within the issues, that theory cannot be rejected when the case comes up for review."

(See, also to the same effect: *San Juan Light Co. v. Requena,* 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680; *Fleishacker v. Blum,* 109 F. (2d) 542, cert. den. 311 U. S. 665; *Lyons v. Empire Fuel Co.,* 262 Fed. 465; *Houle v. Helena Gas & Elec. Co.,* 31 F. (2d) 671; *Bjornquist v. Barton & A. R. Co.,* 250 Fed. 929, cert. den. 248 U. S. 593.) The same rule obtains in California. (*Peck v. Noee,* 154 Cal. 351; 2 Cal. Jur. p. 240, citing many cases.) Section 4½ of Article VI of the Constitution of California provides in part the following:

> "No judgment shall be set aside, or new trial granted in any case, . . . for any error as to any matter of pleading . . . unless, after an examination of the entire case, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

It is also pertinent to add, that, the existence of the secret or collateral agreement having been proved and found, even if the theory of law upon which the California Supreme Court affirmed the judgment differed from that of the trial court, that still petitioner's contention is without merit. It is the long established rule in California, that:

> "If the judgment or order in question is right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusions."
>
> *Davey v. So. Pacific Co.,* 116 Cal. 325-329;
>
> 2 Cal. Jur., p. 809, citing many cases.

III.

Petitioner Acquired No Vested Rights Under the Decree of Distribution, for the Probate Court Was Without Jurisdiction to Declare the Equities Under Which Respondents Claimed, as Held by the California Supreme Court.

The jurisdiction of the California probate courts stems from the Constitution and laws of that state. (Calif. Const., Art. VI, Sec. 5; California Probate Code, Secs. 300-1242.) And here the highest court of the state has held that the probate court had no jurisdiction to impose a resulting trust upon property passing out of probate. The reasons for this may be simply stated under California law.

It is fundamental California law that *all* questions relating to trusts of whatever nature are, in the absence of statute, solely and exclusively in the jurisdiction of equity. It is equally certain that the jurisdiction of California Superior Courts while sitting in probate has always been in control of the Legislature. And, prior to the enactment in 1889 of Code of Civil Procedure Section 1699 (now Probate Code, Section 1120) those courts, while sitting in probate, *possessed no equity jurisdiction whatsoever*. These matters are too well settled to require the citation of authorities, but we may refer in this connection to *Parkman v. Superior Court*, 77 Cal. App. 321, 323-6; *Estate of Hubbell*, 121 Cal. App. 38, 41-3; *Estate of McLellan*, 8 Cal. (2d) 49, 55-6. As the Supreme Court said in the case last cited:

> "Except for that statute [Probate Code, 1120] the Superior Court would have no authority, in the exer-

cise of its probate jurisdiction, to hear and determine the account presented by a testamentary trustee."

And, as the court held in that case, the equity jurisdiction conferred by that section is only partial and incomplete and is strictly limited by the terms of the statutory grant. In the *Hubbell* case, *supra,* for example, the court held that the Superior Court, while sitting in probate, under Section 1120 has no jurisdiction to terminate a testamentary trust (although a court of equity undoubtedly has that power) because that particular element of equity jurisdiction was not granted by that section.

It is thus clear that the only equity jurisdiction possessed by California courts in probate is that granted to them by Section 1120, which is partial and incomplete and cannot be extended beyond the express terms of the grant. And that jurisdiction is limited in *time,* as well as in extent, by the terms of the grant. By those express terms, it cannot be exercised until *"after distribution."* It is a grant of limited equity jurisdiction over the administration of testamentary trusts, and it cannot be exercised until after distribution to the trustees because until then there is nothing to be administered by them.

> "Sections 1120 and 1121 confer jurisdiction in the Probate Court *after* distribution of the estate, when the trust has been created, exists and *survives the distribution* of the estate." (Emphasis added.)
>
> *Estate of Rey,* 31 Cal. App. (2d) 648, 653 (petition for hearing by Supreme Court denied May 18, 1939).

Accord:

Gillette v. Gillette, 122 Cal. App. 640, 642.

It follows that the Probate Court, being powerless to impress the trust declared in this (equity) case, had no alternative other than to distribute to appellant, the devisee named in the will. And, as was implicit in the holding of the California Supreme Court, the decree was conclusive *only* as to the fact that the legal title to the assets passed to appellant, without affecting in the slightest the right of these respondents to assert their equities in the proper forum.

The result is that, in the eyes of equity, petitioner took the assets, not in his own right, but subject to their being impressed with a trust at the suit of the beneficial owners. As a matter of fact petitioner himself admits the Probate Court lacked the equity jurisdiction to impress the trust. In his appellant's reply brief in the last appeal (2d. Civil No. 14280), he states at page 33 (Vol. 10):

> "As previously stated in this brief, if there was any collateral agreement it was a matter for cognizance by our courts of equity, but it was of no concern whatever to the probate court."

And petitioner in support of the foregoing statement cited the following California cases: *Prior v. Andrews,* 83 Cal. App. 782-789; *Curdy v. Berton,* 79 Cal. 420, 427, and *Lauricella v. Lauricella,* 161 Cal. 61.

Petitioner thus himself admits that he acquired no "vested" right in the assets at all, in the sense in which he uses the term and, hence, once again he has failed to show a constitutional question.

As a subordinate contention under his Point 2, petitioner complains of being compelled to turn over the property to persons not claiming to be beneficiaries, and with-

out inquiry as to the validity and other incidents of the trust. At the same time, at page 29 of his brief, he concedes that under settled usages and modes of procedure he could lawfully be deprived of his rights under the decree:

> "2. Without an attack upon the decree, and proceeding upon the theory that there was a trust created by collateral agreement:
>
> * * * * * * * *
>
> "(b) At the instance of heirs of the decedent upon a judicial determination that such trust created by collateral agreement was invalid."

This, of course, is our case. Restatement, Trusts, Sections 54d, 55h, 411q.* Petitioner asserts, however, that there had been no judicial determination of the invalidity of the trust attempted to be created by collateral agreement, but only as to that attempted to be created by Article Five of the will. He thus ignores entirely the significance of Finding XI quoted above, which clearly indicates that the provision in the will related back directly to, and was merely evidence of, the collateral agreement; and, above all, he most studiously forgets the contention made by him in the District Court of Appeal, namely, that the existence of the collateral agreement which was *essential* to any possible cause of action in the respondents. To

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*And see, also, Scott on Trusts, Vol. 1, p. 312, where it is said:

> "It has been held that if B agrees to hold in trust for or to convey to some one whose identity is not communicated to B until after A's death, B cannot be compelled to hold for the person intended by A; but since B would be unjustly enriched if he were allowed to keep the property, he will be held as constructive trustee for A's heirs or next of kin."

claim, as petitioner does claim, that the provision in the will is anything other than the collateral agreement in attempted action, amounts to simply refusing to face the facts.

Beyond all this, however, petitioner is in no position to complain of being compelled to turn the assets over to the heirs where the beneficiaries are legally unascertainable. He is not a faithful trustee, seeking to discharge his fiduciary obligations to the beneficiaries. He denies the existence of the trust, and claims in his own right. Under these circumstances, he has no standing to complain that the law, to avoid unjust enrichment on his part, directs that the assets go to the complaining heirs in manner and form as provided in the judgment below. He cannot complain that property which he does not own is awarded to another. (*Estate of Bryant,* 3 Cal. (2d) 70.)

For the reasons hereinabove set forth, it is respectfully urged that the petition for *certiorari* herein be denied.

Respectfully submitted,

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